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MORANDUM

THE WHITE HOUSE

WASHINGTON

SECRET

June 12, 1969

MEMORANDUM FOR DR. HENRY A. KISSINGER

FROM : Robert E. Osgood REO

SUBJECT: Imminent potential conflict between law of sea treaty, seabeds treaty, and fishing-rights dispute with Peru

I. CONFLICTING INTERESTS

Within the next week or two the U. S. faces a potential conflict between its interests in (1) a new law of the sea treaty, (2) a treaty for peaceful uses of the seabeds, and (3) a resolution of the fishing-rights crisis with Peru.

If the first question is not resolved before the second and the third questions, it will be in jeopardy. Prior resolution of the first two questions in a manner consistent with each other would complicate, but not necessarily preclude, resolution of the third.

Unless the President makes a judgment on priorities among these interests and the tactics for translating his judgment into policies, the chances are that (1) the Peruvian question will be resolved in a way that will probably preclude, but certainly cripple, successful negotiations on a law of the sea treaty, that (2) the present U. S. position in the UN favoring an internationally agreed boundary as soon as possible for the continental shelf -- a position that preserves the option for a narrow boundary which DOD requires for national security reasons -- will be jeopardized by inter-agency haggling while UN talks are in progress, and that (3) any vacillation on the present U. S. position will encourage unilateral claims to superjacent waters which will conflict with the law of the sea treaty.

II. LAW OF SEAS AND THE PERUVIAN CRISIS

The more important and urgent conflict is between the law of the seas treaty and the resolution of the fishing-rights dispute with Peru.

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The Stakes

At stake in achieving a new law of the sea treaty is the orderly world-wide use of the seas for commercial as well as military purposes. This orderly use is already eroded and will be further threatened in the next few years by (a) proliferation of expanding and conflicting claims to boundaries for the territorial sea and/or continental shelves, and by (b) multiplication of constraints and conflicting claims concerning navigation of international straits. These threats to orderly use of the seas impinge upon America's military mobility in the world, its commercial interests, and its general interest in an international environment congenial to a maritime power with global interests. We have now progressed far toward achieving agreement with the Soviet Union on an international law of the sea treaty, and we have also gone far toward gaining a consensus of support among our allies on this treaty. We are at a critical stage today because in 1958 the Geneva Conference on the Law of the Sea, while accomplishing much, failed to set definite limits either to the territorial sea or the continental shelf.

The proposed treaty

Article One of the proposed treaty establishes a twelve-mile limit to Territorial seas. Article Two sets forth rules for free navigation through and over international straits. Article Three formulates a complicated system of economic preferences for determining the territorial extent of fishing rights. There is general agreement that acceptance of Article One and Two is contingent upon acceptance of Article Three. The major reason is that without Article Three there is no inducement for a great many states who have already established their claims to a twelve-mile limit to accept the treaty.

Articles One and Two are important because:

(a) the U. S. never physically contests claims to twelve miles, although it files paper protests, and

(b) if twelve miles becomes the internationally accepted de facto limit, 116 international straits (of which a dozen are very important) will be overlapped by territorial sea. Therefore, (i) warships will be subject to the right of innocent passage. Some nations regard carriage of

nuclear weapons and even nuclear powered vessels as non-innocent. Some regard destination (viz. Israel) as non-innocent. (ii) Moreover, aircraft have no right of innocent passage in international law; so overflight of these 116 straits would be by permission of the subjacent state. (Access to the Mediterranean could foreseeably depend on Spain's permission if land routes were denied to us.)

The treaty's relationship to the Peruvian crisis

The conflict between this treaty and our relations with Peru arises because presently proposed resolutions of the Peruvian fishing-rights dispute will almost surely prevent acceptance of Article Three. Article Three does not go far enough to satisfy Peru's appetite; and if we go farther, other nations will follow Peru's path rather than the treaty path. If we modify the treaty to suit Peru, we will lose the support of our allies and the Soviet Union.

In the absence of a resolution of this dispute, we face an accentuated crisis in our relations with Peru. Peru claims territorial sovereignty out to 200 miles from its coast and has seized our tuna fishing boats within this limit. In response to these seizures the U. S. is under great domestic pressure to apply sanctions to Peru which may lead Peru to break diplomatic relations and to take other punitive measures possibly against U. S. nationals.

To avoid this further deterioration of relations, the Department of State intends to send a representative to a fisheries conference between the U. S., Peru, Ecuador, and Chile to negotiate a modus vivendi that would satisfy Peru and American tuna fishers. But any such modus vivendi would entail de facto acceptance of Peru's 200-mile claim. No disclaimers stating that a deal governing fishing rights beyond the 12-mile limit were made without prejudice to the juridical status of the seas to which it applied would obviate the fact that by negotiating the terms for use of these seas we had conceded that they were not part of the high seas. In any case, as mentioned above, any terms that would satisfy Peru would far exceed the latitude of usage permitted in Article Three of the proposed worldwide treaty. Consequently, potential signatories of the law of the sea treaty, faced with U. S. concessions to Peru on terms more generous than those of Article Three would have every reason not to accept Article Three. And this would doom the treaty.

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III. LAW OF THE SEAS AND THE SEABEDS TREATY

The issue

We have begun preliminary discussions in the UN looking toward a treaty governing the status of the deep seabeds. One of the key questions is where the continental shelf ends and the deep seabeds begin. American oil interests want a broad definition of the shelf. The Department of the Interior takes virtually the same position. The Department of Defense, having in mind military security interests, wants a restricted definition. The resolution of this issue will affect more than our commercial opportunities and military security. It will also affect the law of the sea treaty and the matters with which it proposes to deal.

The existing law

According to the Geneva Convention on the Continental Shelf, which was ratified by the U. S. and 27 other states, the shelf extends throughout an area that ends where the water is 200 meters deep; but it may be extended by coastal states as far as the "superjacent waters admit of the exploitation of the natural resources of the . . . area." The Convention limits a coastal state's sovereign and exclusive rights on the shelf to exploiting its natural resources and specifies that these rights do not affect the status of superjacent waters as high seas.

The consequences

This flexible definition, however, poses problems for industry by creating uncertainty for capital investment and poses problems for national defense by permitting foreign states to extend their sovereign rights to great distances. As a result, rights for exploitation tend to lead to claims of total sovereignty including sovereignty over superjacent waters.

Claims of total sovereignty, even if restricted to the exploitable area of the shelf, lead to the exclusion of foreign military activities in that area. According to DOD such exclusions would apply to SOSUS devices for detecting and tracing submarines, which for technical reasons are most effective when placed on continental slope area within a boundary of 550 meters depth.

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Claims of sovereignty over superjacent waters have already occurred due to great pressure from fishing interests in several countries including the U. S. to claim exclusive fishing rights in the waters above the exploitable area of the shelf. It is also significant that Chile, Ecuador, and Peru based their 200-mile territorial sea claims on the Truman Proclamation of 1945, which unilaterally declared jurisdiction over the natural resources of the shelf. But not only does the present broad and ambiguous definition of the continental shelf lead to the extension of claims for exclusive fishing rights and total sovereignty in the waters above; the proliferating claims to expanded areas of fishing rights lead to claims to exclusive rights and sovereignty on the shelf below.

The relation of seabeds to law of the sea

Clearly, then, the various claims to rights and sovereignty over the continental shelf are integrally related to the uses of the sea that would be regulated by the three articles of the proposed law of the sea treaty. The proposed treaty, if negotiated to a successful conclusion, would prevent some of the difficulties concerning use of the seas that arise from extensions of claims on the continental shelf, since the pressure to extend the legal regime of the shelf to the superjacent waters would abate. But if ratification of a seabeds treaty were to precede ratification of the law of the sea treaty, and if this seabeds treaty contained a broad definition of the continental shelf, it would indirectly conflict with the law of the seas treaty.

The U. S. positions

The Department of State, in formal and informal discussions in the UN on a seabeds treaty has advanced a set of "principles," including the following: "There should be established, as soon as practicable, and taking into account relevant international law, an internationally agreed precise boundary for this area." The Department of Interior, however, has refused to accept this principle and would substitute for the last phrase the following: "an internationally accepted boundary for this area should be precisely defined." The effect of the Department of Interior's wording would be to set off a wave of extensive boundary claims by states, which would preclude international agreement on narrower boundaries. Indeed, such claims are likely to occur anyway unless there is an international moratorium on boundary claims

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-- a proposal which DOD has twice (in letters from Nitze and Packard on 6 January 1969 and 6 March 1969, respectively) urged the Department of State to include in its principles but which the Department has not answered.

It is not clear what position the Department of State plans to take when informal consultations begin at the UN on June 16. Apparently, they are not going to endorse the term "agreed" until either the Department of Interior or DOD is declared the winner.

IV. CONCLUSIONS

The juxtaposition of these two prospective treaties and the Peruvian crisis portends important policy decisions (or lack of decisions) which will affect America's interests in the long run as well as in the short run. The President will not have an opportunity to affect these decisions if the related issues are not presented to him and the NSC for deliberation.

Rather than attempt to spell out all the options with pros and cons at this late date, I suggest that the following policy conclusions would follow if my facts and priorities are correct.

1. The Department of State should include in its principles concerning the seabeds treaty the proposal of an international moratorium on boundary claims.

2. The President should ascertain whether the Department of State intends to use the original language of its principle with the word "agreed." If not, a decision should be reached on the differences on this wording between DOD, the Department of State, and the Department of the Interior.

3. Measures for the moment should be taken at the White House level to coordinate American policies and actions on the seabeds treaty with policies and actions on the law of the sea treaty, particularly with a mind to preventing a broad definition of the continental shelf from being accepted before successful negotiation of a new law of the sea treaty.

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4. Before the U. S. representative in the fisheries conference takes a position on a modus vivendi with Peru, it should be ascertained whether this position would jeopardize acceptance of Article Three of the law of the sea treaty.

If so, the President might decide that this government should go ahead with the resolution of the fisheries dispute anyway and try to mitigate the impact of the resolution on the law of the sea treaty.

In view of the improbability of our being successful in mitigating the impact, however, we must know our options if the law of the sea treaty negotiations fails because of Peru or indeed for other reasons. Perhaps the only way we could then protect the three mile territorial sea position which entitles us to go through straits more than six miles wide freely would be to be ready at all times to ignore other countries' claims, thereby forestalling the growth of international (customary) law in the direction of acceptance of twelve-mile and greater limits. In essence this would involve the show or use of force on a continuing basis to assure unimpeded sea and air mobility against friend and foe alike.

On the other hand, the President might decide that we should tell the Peruvians that we attach great importance to Article Three of the law of the sea treaty; that we wish they would find Article Three to their interest too, while recognizing that they may not; that we shall therefore not jeopardize the law of the seas treaty by the way we settle the fisheries dispute; but that we are prepared either to arrange a modus vivendi consistent with that treaty before it is a worldwide agreement or to try to accommodate Peruvian and American interests in an arrangement after successful negotiation of the treaty.

5. If we tell the Peruvians about our negotiations on the law of the sea treaty, we should tell the Russians and our allies about our problems with the Peruvians. If we intend to make a deal with Peru that may be interpreted as

conflicting with Article Three, we should prepare the Russians and our allies for the bad news.

RECOMMENDATION:

That you should explain to the President the situation described in this memorandum and recommend that this Government, in order to protect itself against conflicting positions on the law of the sea treaty, the seabeds treaty, and the Peruvian fishing-rights dispute, should initiate a study of the policy options for guiding its negotiations and decisions on these three questions.

Approve HK

Disapprove _____

Do brief memo to Pres
+NSSM for study